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No. 85-1587

In the Supreme Court of the United States

OCTOBER TERM, 1985

DELORES AGEE, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court acted within its discretion in approving a consent decree settling a lawsuit brought by the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against an employer and a local chapter of a union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 768 F.2d 884. The opinion of the district court (Pet. App. A17-A85) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1985 and rehearing was denied on October 8, 1985. The petition for a writ of certiorari was filed on January 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners contend that the courts below erred in approving a consent decree entered into between respondent Equal Employment Opportunity Commission (EEOC) and respondents Hiram Walker & Sons, Inc. (Hiram

Walker) and the Distillery Workers of America, Local 55 (Union).

1. In 1979, the EEOC filed a lawsuit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against Hiram Walker and the Union, alleging that they had engaged in unlawful sex-based discrimination against female employees at Hiram Walker's plant in Peoria, Illinois, which has been closed since late 1981 (Pet. App. A2, A3, A19). Based on EEOC's investigation of charges filed with the Commission in 1975 and 1977,[1] EEOC alleged that Hiram Walker unlawfully discriminated with respect to job assignment, promotion, transfer, layoff, and benefits, and that Hiram Walker and the Union had entered into collective bargaining agreements that perpetuated those discriminatory practices (*id.* at A19-A20). In particular, EEOC's lawsuit focused on discrimination against female employees who worked in Hiram Walker's all-female Bottling Line Division and who, for reasons disputed by the parties, Hiram Walker frequently laid off from employment. Because the time spent on layoff reduced their years of credited service for pension purposes, female employees received lower pension benefits than similarly situated males (*id.* at A4).

Following extensive pre-trial discovery, the EEOC, Hiram Walker, and the Union negotiated a consent decree, which, in September 1983, they filed with the district court for preliminary approval (Pet. App. A21). The proposed

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[1] In 1975, 123 individual women, the National Organization for Women, and the Union, filed charges with the EEOC alleging that Hiram Walker had unlawfully discriminated against female employees with regard to pension benefits (Pet. App. A2, A17-A18). In 1977, 113 individual women filed charges with the EEOC alleging that Hiram Walker and the Union had unlawfully discriminated against female employees with regard to job assignment, job exclusion, transfer, promotion, layoff, and certain benefits (*ibid.*).

consent decree (approved by the courts below) provides limited relief to female employees who were initially assigned to the Bottling Line Division and who demonstrated, by having transferred to other divisions during their careers, that they would have accepted an initial assignment in another division and would have performed successfully in that assignment (*id.* at A5, A32-A33). The decree provides pension relief to females hired before 1965 whose answers to questionnaires and work histories evidenced a willingness after 1965 to hold what was then considered a "man's job" (*id.* at A5, A33-A34).

The consent decree also provides for a total of $165,600.00 in direct monetary relief (Pet. App. A5, A34). The accrual date for this relief begins in 1975 (two years before the charges alleging discrimination in initial assignment were filed) and runs through 1981, the year the plant closed. The lump sum is based in part on the difference between the earnings of females who, according to specific guidelines developed by the parties, demonstrated a willingness to hold a "man's job" during the accrual period, and the earnings of males with comparable plant seniority (*id.* at A34-A35). The decree allocates the monetary relief, in varying amounts, to 82 females employees who, by their work history, demonstrated a willingness to hold a "man's job" through actual performance in such a job during the accrual period (*ibid.*; see *id.* at A102-A106). Charging parties who receive no other relief under the decree are entitled to share in any sums ultimately not allocated because the individual female employee entitled to the relief is deceased or cannot be found (*id.* at A108-A109).

2. The district court approved the consent decree as "fair" and "reasonable" after providing for notice to affected female employees, receiving written objections from some female employees, and conducting a public hearing at which the court heard arguments both in favor and in

opposition to the decree (Pet. App. A18, A21-22). The court specifically considered the claims of those objecting to the decree on the grounds (1) that the decree provided less relief to senior female employees, even though they would have suffered the most from the alleged discriminatory practices, and (2) that the decree failed to account for the fact that Hiram Walker actively discouraged female employees from transferring to a "man's job" (*id.* at A36-A43). The court stressed several factors in support of its decision to approve the decree, including that (1) there was a "real possibility that the litigation would continue for an extended period of time" (*id.* at A78-A79); (2) there were many "hotly contested" legal issues between EEOC, Hiram Walker, and the Union, which if "decided in favor of Hiram Walker, the end result would be no relief at all, or at least less relief than is contained in the Consent Decree" (*id.* at A80);[2] (3) the legal issues were not "well settled in [EEOC's] favor" (*ibid.*); (4) Title VII was not enacted until 1964 and, therefore, does not reach many of the claims of the more senior female employees (*id.* at A81); and (5) there would inevitably be some "arbitrariness" in any allocation formula fashioned (*id.* at A82). The court, however, granted leave to intervene for purposes of appeal to all charging parties who had filed objections to the decree and to all non-charging party objectors whose claims involved a question of law or fact common to the instant lawsuit (*id.* at A51-A76, A83-A84, A86-A87).

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[2]Among the legal issues disputed are whether (1) a 300-day state statute of limitations applies to the discrimination claims; (2) a two-year federal statute of limitations applicable to claims for back pay (see 42 U.S.C. 2000e-5(g)) was tolled by the 1975 filing of charges (instead of the 1977 filing); (3) the same federal limitations period applies to claims for pension relief; (4) Hiram Walker had a "bona fide" seniority system within the meaning of Title VII (see 42 U.S.C. 2000e-2(h)); and (5) Hiram Walker can defeat a discrimination claim merely by establishing that the complaining employee once turned down a transfer opportunity. See Pet. App. A43-A51; see also *id.* at A4-A5.

3. The court of appeals affirmed (Pet. App. A1-A15), concluding that the trial court had carefully considered petitioners' objections and did not abuse its discretion in approving the consent decree (*id.* at A10-A11). While noting petitioners' assertion that those who allegedly suffered the most discrimination over the longest period of time received less relief under the decree (*id.* at A6-A7), the court of appeals ruled that the trial court had "properly focused its analysis on a comparison of the settlement benefits * * * with the likely outcome of litigation" (*id.* at A10). The court stressed that none of the factors that might call for heightened scrutiny of the decree (*e.g.*, greater benefits to named plaintiffs, absence of extensive discovery) was present here; although many female employees who had been excluded from relief objected to the decree, none had "established that she should have been included" and "there was a substantial risk that no employees would have received any relief had the case gone to trial" (*id.* at A11-A13). Finally, the court rejected petitioners' contention that the settlement was inconsistent with the "remedial goal of Title VII to make whole the victims of sex discrimination" (*id.* at A14). According to the court, the "duty of a district court to make whole a victim of discrimination 'arises only after a judicial determination of discrimination' " and, therefore, does not apply in the context of a settlement (*ibid.*; quoting *United States* v. *Trucking Employers Inc.*, 561 F.2d 313, 317 n.13 (D.C. Cir. 1977)).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of any other court of appeals, or of this Court, and presents no issue warranting this Court's review.

1. The petition for a writ of certiorari cites no decisions of any court of appeals and only incidentally cites one decision of this Court in support of its request for review

(Pet. 10, citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971)). Petitioners seek review essentially on the ground that the precise terms of the consent decree they challenge are, in their view, unfair and unreasonable in light of the particular circumstances of the case. Petitioners acknowledge that the standard of judicial review of a consent decree may have been limited in the courts below, but believe "that this Court of last resort is not so limited" (Pet. 23). Petitioners, however, misconceive the role of this Court, which is not simply to correct case-specific errors possibly committed by lower courts and which, in all events, is not to apply a stricter standard of judicial review than that of lower courts.

2. Petitioners' objections to the consent decree, moreover, lack any legal merit. Petitioners argue (Pet. 9-16) that the consent decree is inconsistent with the remedial purpose of Title VII to provide victims of sex discrimination with "make whole" remedies. As the court of appeals correctly concluded (Pet. App. A14), however, Title VII does not create a requirement that courts "make whole" persons who may or may not have been victims of discrimination. The essence of a settlement is compromise. See *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). And where, as here, there was a "substantial risk that no employees would have received any relief had the case gone to trial" (Pet. App. A13), the decision to settle is not inconsistent with Title VII, which, as petitioners acknowledge (Pet. 15), prefers voluntary resolution of disputes (see 42 U.S.C. 2000e-5(f)(1)).[3]

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[3]Petitioners erroneously claim (Pet. 12-13) that the EEOC defends the consent decree on the ground that Title VII's two-year statute of limitations applicable to back pay awards (see 42 U.S.C. 2000e-5(g)) limited their claims for pension relief. EEOC opposed that argument, made by Hiram Walker, as well as Hiram Walker's other defenses. See note 2, *supra*. The consent decree did not in any manner resolve those legal issues and reflects only the risks each respondent perceived it faced in proceeding to trial.

Petitioners also argue (Pet. 17-24) that the consent decree is unfair and unreasonable both because it provides less or no relief to those senior female employees who allegedly suffered more from discriminatory practices and because, by making an employee's prior acceptance of a transfer to a "man's job" a criterion for certain relief, the decree ignores the consideration that Hiram Walker actively discouraged female employees from accepting such transfers. Petitioners, however, fail to take into account the impact on settlement negotiations of the *legal* merits of the various claims at issue, including the strength of the various defenses advanced by Hiram Walker. See note 2, *supra*. One defense of particular concern was Hiram Walker's contention that applicable statutes of limitations barred many of the discrimination claims made by more senior employees. See Pet. App. A43-A44, A46-A51. Another such defense was Hiram Walker's argument that those female employees who had once declined an opportunity to take a "man's job" could not now establish that they had been victims of discrimination. See *id.* at A45-A46. Although the EEOC contested both these defenses, the defenses remained concerns that could not be ignored in settlement negotiations.

As the courts below recognized (Pet. App. A10, A80-A81), the reasonableness of a settlement agreement turns on the "likely outcome of the litigation" in the absence of settlement and not merely on the allegations of the parties. The terms of the consent decree, including the allocation of relief provided, reflect the respondents' assessments of the relative strengths and weaknesses of their legal arguments concerning the various claims of discrimination. There is no guarantee that those claims alleging the greatest discrimination will necessarily be those supported by the strongest legal arguments, particularly, where, as here, statutes of limitations could potentially have greater impact on more

senior employees' claims and problems of proof could disadvantage claims by individuals whose work history did not demonstrate as clearly as it might for others the impact of discrimination. The courts below correctly determined that the terms of the decree reflect the risks inherent in litigating these and other contested legal issues and that none of those employees excluded from relief under the consent decree had demonstrated a right to be included. Review of those rulings is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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